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FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Aug 11, 2020

SEAN F. MCAVOY, CLERK

5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 JEANETTE HOTES-APRATO,  
8 Personal Representative of the Estate  
of Robert John Aprato, Jr.,

9 Plaintiff,

10 v.

11 ACI NORTHWEST, INC., an Idaho  
12 corporation,

13 Defendant.

NO: 2:19-CV-200-RMP

ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT

14 BEFORE THE COURT is Plaintiff Personal Representative Jeanette Hotes-  
15 Aprato's Motion for Partial Summary Judgment regarding Subcontractor Liability,  
16 ECF No. 38. Having reviewed the parties' filings, the remaining docket, and the  
17 relevant law, and having heard oral argument, the Court is fully informed.<sup>1</sup>

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21 <sup>1</sup> The Court also reviewed the May 21, 2020 letter submitted after oral argument by  
Defendant ACI Northwest, Inc. ECF No. 51.

## 1 BACKGROUND

2 The following facts are undisputed for purposes of the partial summary  
3 judgment motion, unless otherwise noted. During the relevant timeframe, Crown  
4 Resources-Kettle River Operations (“Crown Resources”) owned and operated the  
5 Buckhorn Mine, an underground gold ore operation located in Okanogan County,  
6 Washington. ECF Nos. 40-1 at 4; 42 at 1–2. The U.S. Department of Labor—Mine  
7 and Safety Health Administration (the “MSHA”) regulated the mine. ECF No. 43 at  
8 2.

9 The first 8.7 miles of the haul road from the mine entrance consist of a two-  
10 lane gravel road called Forest Service Road 3550 (“FSR 3550”), passing over U.S.  
11 Forest Service land. ECF Nos. 43 at 2–3; 48 at 10–11. Crown Resources entered  
12 into contracts with ACI to maintain FSR 3550 and to haul ore. ECF Nos. 43 at 2; 48  
13 at 2. In the “Haul Road Maintenance and Service Agreement,” ACI was named as  
14 Crown Resources’ “Contractor” for daily maintenance of the haul road. ECF No.  
15 43-2 at 2, 11. The second contract, the “Transportation and Service Agreement,”  
16 between Crown Resources and ACI designated ACI as the “Carrier” responsible for,  
17 in relevant part, transporting ore from the Buckhorn Mine, as well as other mining  
18 operations owned by Crown Resources. ECF No. 43-1 at 2.

19 The Transportation and Service contract between Crown Resources and ACI  
20 requires ACI to “maintain, at its sole cost and expense, safe and adequate service,  
21 equipment and facilities . . . and shall maintain all such equipment in good repair and

1 condition.” ECF No. 43-1 at 2. The contract also specifies that ACI “will be  
2 required to comply with all operational requirements as they relate to [the Mine  
3 Safety and Health Act] (training plan, documentation, pre-op checks, etc.).” *Id.* at 4.  
4 The contract provides that ACI “shall control all means and methods of performing  
5 under this Agreement . . .” *Id.* at 14. Further, ACI “agrees to and does accept  
6 exclusive responsibility, supervision, control and liability with respect to its  
7 employment of any and all persons in the performance of this Agreement, including  
8 employment of approved subcontractors.” *Id.*

9 The parties dispute whether ACI was the general contractor under either  
10 contract. *See* ECF Nos. 42 at 2; 48 at 2–3. Plaintiff highlights that, during his  
11 deposition in this litigation, ACI Project Manager Scott Sullens responded in the  
12 affirmative when asked whether it was “fair” to call ACI a “general contractor” for  
13 hauling and road maintenance. ECF No. 44 at 2. Defendant submitted a declaration  
14 from Mr. Sullens adding:

15 When I agreed that ACI could be considered a “general contractor” for  
16 certain work, I did not mean that ACI had supervisory authority that  
17 general contractors have, for example, on construction sites. Instead, I  
meant that ACI could be considered the lead entity for that certain work.

*Id.*

18 ACI subcontracted with Giddings Excavation, LLC (“Giddings”), located in  
19 Republic, Washington, to provide one truck, including one driver, to assist in  
20 hauling ore. ECF Nos. 40-1 at 4; 43-3 at 3.

1       On December 21, 2016, Robert John Aprato, Jr. was working at the Buckhorn  
2 Mine driving a dump truck from the mine to the mill. ECF Nos. 40-1 at 4; 48 at 4.  
3 Mr. Aprato began driving the truck down the mountain on FSR 3550 to the mill  
4 when the brakes failed. ECF No. 48 at 4. Mr. Aprato was heard over the radio  
5 calling “no brakes, no brakes.” ECF Nos. 42 at 3; 48 at 4. The truck careened down  
6 a 20-foot embankment to the roadway below. ECF No. 48 at 5. Mr. Aprato  
7 sustained a head injury in the wreck and died on December 24, 2016. *Id.*

8       The parties dispute the condition of the road at the time of Mr. Aprato’s  
9 accident, with Plaintiff maintaining that the road was “packed snow and ice” and  
10 Defendant offering photos from the morning after the accident showing the  
11 condition of the road as “paved and sanded.” ECF Nos. 42 at 3, 48 at 4. ACI  
12 includes in its opposition to partial summary judgment an expert report that states  
13 that, more probably than not, Mr. Aprato would have detected brake defects on the  
14 truck had he performed pre-trip and post-trip inspections. ECF No. 46-4 at 3–4.  
15 ACI’s expert report further asserts that Mr. Aprato was required to perform pre- and  
16 post-trip inspections as a commercial driver’s license holder pursuant to U.S.  
17 Department of Transportation regulations. *Id.*; *see also* ECF No. 48 at 11–13.

18       A “private citizen” notified the MSHA of Mr. Aprato’s death on January 3,  
19 2017, and the agency began to investigate the same day. ECF Nos. 40-1 at 5; 48 at  
20 6. On February 23, 2017, the MSHA issued two citations to ACI for failing to  
21 comply with applicable federal regulations governing the control and maintenance of

1 the dump truck. ECF No. 40-1 at 7–8. The MSHA also issued citations to Giddings  
2 for failing to comply with the same federal regulations. *Id.* at 8–9.

3 On January 15, 2019, the Washington state court appointed Mr. Aprato’s  
4 sister, Jeanette Hotes-Aprato, to serve as the personal representative for Mr.  
5 Aprato’s estate. ECF No. 48 at 6. In her representative capacity, Ms. Hotes-Aprato  
6 filed a wrongful death action in state court on February 13, 2019. ECF No. 2-1.  
7 Defendant removed the matter to the United States District Court for the Western  
8 District of Washington, based on diversity jurisdiction, on February 25, 2019, ECF  
9 Nos. 1 and 2, and that court granted a motion by Defendant to transfer venue to this  
10 District on May 20, 2019. The matter was transferred on June 5, 2019. ECF No. 22.

## 11 **SUMMARY JUDGMENT STANDARD**

12 Summary judgment serves “to isolate and dispose of factually unsupported  
13 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). Summary  
14 judgment is appropriate if the evidence, viewed in the light most favorable to the  
15 nonmoving party, shows “that there is no genuine issue as to any material fact and  
16 that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).  
17 Only disputes over facts that might affect the outcome of the suit will preclude the  
18 entry of summary judgment, and the disputed evidence must be “such that a  
19 reasonable jury could return a verdict for the nonmoving party.” *Anderson v.*  
20 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

1        “[A] party seeking summary judgment always bears the initial responsibility  
2        of informing the district court of the basis for its motion and identifying those  
3        portions of [the record] which it believes demonstrate the absence of a genuine issue  
4        of material fact.” *Celotex*, 477 U.S. at 323. Parties opposing summary judgment are  
5        must cite to “particular parts of materials in the record” establishing a genuine  
6        dispute or show why the materials cited do not establish either the absence or  
7        presence of a genuine dispute. Fed. R. Civ. P. 56(c)(1). “[T]here is no issue for trial  
8        unless there is sufficient evidence favoring the non-moving party for a jury to return  
9        a verdict for that party. If the evidence is merely colorable or if not significantly  
10       probative, summary judgment may be granted.” *Anderson*, 477 U.S. at 249–50  
11       (internal citations omitted). “Conclusory allegations unsupported by factual data  
12       cannot defeat summary judgment.” *Rivera v. Nat'l R.R. Passenger Corp.*, 331 F.3d  
13       1074, 1078 (9th Cir. 2003).

## DISCUSSION

15 Plaintiff seeks partial summary judgment on the issue of ACI's liability for  
16 Giddings' negligence, as a matter of law and if the elements other than duty are  
17 proven at trial, on the basis of two grounds of vicarious liability and two grounds of  
18 direct liability. ECF Nos. 38 at 5; 47 at 3. Plaintiff relies on the Washington  
19 Supreme Court's opinion in *Vargas v. Inland Washington, LLC*, 194 Wn.2d 720  
20 (Wash. 2019), to support her four theories of recovery. See ECF No. 47 at 2.

1       Defendant counters that the *Vargas* decision is irrelevant to the claim in this  
2 case because *Vargas* and the caselaw it relies on “assume a traditional hierarchy of a  
3 jobsite owner, a general contractor, and subcontractors.” ECF No. 41 at 13.  
4 Defendant argues that direct liability, “a claim that the general contractor violated a  
5 duty owed directly to the subcontractor’s employee[,]” is inapplicable to this case  
6 and not raised by Plaintiff’s motion. ECF No. 41 at 2. Defendant also rejects that  
7 ACI could be vicariously liable for breach of a nondelegable duty because “Plaintiff  
8 presents no evidence—nor does she allege—that ACI delegated a nondelegable  
9 duty.” *Id.*

10       With respect to a control-based theory of vicarious liability, Defendant argues  
11 that Plaintiff is asking the Court “to create new Washington state common law”  
12 given that “(1) the accident occurred on a road owned by the U.S. Forest Service and  
13 maintained for public use; (2) the accident was investigated by the federal Mine  
14 Safety and Health Administration (MSHA) and not a state entity (such as the  
15 Washington Department of Labor & Industries (L&I); and (3) the decedent and his  
16 employer were subject to regulations by yet another federal agency, the U.S.  
17 Department of Transportation.” *Id.* at 3. Defendant argues that these “stark  
18 differences” support distinguishing this matter from the holding and reasoning of  
19 *Vargas*, 194 Wn.2d 720. ECF No. 41 at 3, 7.

20       A negligence action and a wrongful death action based on negligence require  
21 a plaintiff “to establish the existence of a duty, breach, resulting injury, and

1 proximate cause between the breach and the injury.” *Jiggens v. Batten*, No. 53595-  
2 1-I, 2005 Wash. App. LEXIS 91, at \*4 (Ct. App. Jan. 18, 2005) (quoting *Reynolds v.*  
3 *Hicks*, 134 Wn.2d 491, 495 (1998)). Plaintiff moves for partial summary judgment  
4 on the duty element, the threshold question in a negligence action. *Taylor v. Stevens*  
5 *Cty.*, 111 Wn.2d 159, 163 (Wash. 1988); *see* ECF No. 38. Whether there is a duty  
6 owed by a defendant presents a question of law. *Hertog, ex rel. S.A.H. v. City of*  
7 *Seattle*, 138 Wn.2d 265, 275 (Wash. 1999).

8 Federal courts exercising diversity jurisdiction, as this Court is, must apply  
9 state substantive law. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1934).

10 In *Vargas*, the plaintiff was severely injured when he was hit in the head by a  
11 concrete hose while working on a parking garage construction project. 194 Wn.2d  
12 at 723. Plaintiff Vargas was employed by the concrete subcontractor on the project,  
13 and he sued the general contractor on the grounds of direct liability, for breaching its  
14 common law duty to provide a safe workplace and violation of the Washington  
15 Industrial Safety and Health Act, and of vicarious liability for the subcontractor’s  
16 negligence. *Id.* The trial court granted summary judgment to the general  
17 contractor, and the Supreme Court reversed on a finding that genuine issues of  
18 material fact persisted as to whether the general contractor was directly liable for  
19 Vargas’s injury and whether the general contractor was vicariously liable for the  
20 subcontractor’s negligence, if any. *Id.* at 744. The *Vargas* opinion addresses direct  
21 liability based on two duties owed by a general contractor to a subcontractor’s

1 employees, as well as two theories of vicarious liability for a general contractor  
2 vicarious liability based on a subcontractor's negligence.

3 Direct Liability

4 The Washington Supreme Court rested its decision in *Vargas* that a general  
5 contractor can be directly liable under the common law for the injuries of an  
6 employee of a subcontractor on its "broad" holding in *Kelley v. Howard S. Wright*  
7 *Constr. Co.*, 90 Wn.2d 323 (1978). 194 Wn.2d at 733. The *Vargas* decision recites  
8 that, based on *Kelley*, "when a general contractor engages a subcontractor and  
9 'retains control over some part of the work,' the general contractor 'has a duty,  
10 within the scope of that control, to provide a safe place of work.'" *Vargas*, 194  
11 Wn.2d at 731 (quoting *Kelley*, 90 Wn.2d at 330). "'The test of control is not the  
12 actual interference with the work of the subcontractor, but the right to exercise such  
13 control.'" *Vargas*, 194 Wn.2d at 731 (quoting *Kelley*, 90 Wn.2d at 330–31). "A  
14 general contractor's 'general supervisory functions are sufficient to establish  
15 control.'" *Vargas*, 194 Wn.2d at 731 (quoting *Kelley*, 90 Wn.2d at 331).

16 Having reviewed the Washington state caselaw upon which Plaintiff relies,  
17 the Court does not find the distinctions to be persuasive that Defendant attempts to  
18 draw between the instant case and a "traditional hierarchy of a jobsite owner, a  
19 general contractor, and subcontractors." ACI was contractually obligated, in its  
20 agreement with Crown Resources, to "maintain, at its sole cost and expense, safe  
21 and adequate service, equipment and facilities . . . and shall maintain all such

1 equipment in good repair and condition.” ECF No. 43-1 at 2. The contract also  
2 requires ACI “to comply with all operational requirements as they relate to [the  
3 Mine Safety and Health Act] (training plan, documentation, pre-op checks, etc.).”  
4 *Id.* at 4. The contract provides that ACI “shall control all means and methods of  
5 performing under this Agreement . . .” *Id.* at 14. Further, ACI “agrees to and does  
6 accept exclusive responsibility, supervision, control and liability with respect to its  
7 employment of any and all persons in the performance of this Agreement, including  
8 employment of approved subcontractors.” *Id.*

9        Regardless of whether Crown Resources owned the mine where Mr. Aprato  
10 loaded the dump truck or whether the portion of the haul road on which Mr.  
11 Aprato’s accident occurred was a public use road over U.S. Forest Service land, Mr.  
12 Aprato’s job site was the dump truck on its route from the mine to the mill. The  
13 quoted language from the contract between ACI and Crown Resources  
14 unambiguously provides that ACI retained “general supervisory functions . . .  
15 sufficient to establish control,” *Vargas*, 194 Wn.2d at 731 (quoting *Kelley*, 90  
16 Wn.2d at 331). Therefore, the Court finds that pursuant to that control, ACI can be  
17 held liable as a matter of law for the accident. Plaintiff is entitled to partial summary  
18 judgment that Defendant owed a common law duty to Mr. Aprato to “provide a safe  
19 place to work.” *See Vargas*, 194 Wn.2d at 734.

20        The *Vargas* decision further held that direct liability may be premised on a  
21 general contractor’s “statutory duty to provide a safe place to work.” 194 Wn.2d at

1 735. The *Vargas* court relied on the Washington Supreme Court’s earlier holding in  
2 *Stute v. P.C.M.C., Inc.*, 114 Wn.2d 454, 457–58, 460 (1990) that the Washington  
3 Industrial Safety and Health Act (“WISHA”) creates such a duty to “all employees  
4 working on the premises,” whether employees of the general contractor or of a  
5 subcontractor. *Id.* Therefore, in *Vargas*, the Washington Supreme Court held that  
6 for direct liability based on a specific duty set forth in WISHA, “no analysis of  
7 whether the general contractor retained control is necessary.” *Id.* at 736.

8 The *Vargas* discussion of a statutory duty to provide a safe work environment  
9 is limited to WISHA. Plaintiff extrapolates from *Vargas* that the federal Mine  
10 Safety and Health Act similarly “creates liability for any entity that ‘operates,  
11 controls, or supervises a coal or other mine.’” ECF No. 38 at 8 (quoting *Ames  
12 Const., Inc. v. Fed. Mine Safety & Health Rev. Comm’n*, 676 F.3d 1109, 1110–11  
13 (D.C. Cir. 2012)). However, the Court does not find that the matter of whether a  
14 general contractor owes a duty directly to its subcontractor’s employees under the  
15 Mine Safety and Health Act is settled in Washington state law. *Vargas* addresses a  
16 state statute, WISHA, and Plaintiff argues that “the same reasoning” applies to  
17 ACI’s duties under the Mine Safety and Health Act. However, Plaintiff does not  
18 cite the Court to caselaw supporting that Defendant owes a duty directly to a  
19 subcontractor’s employee under the Mine Safety and Health Act. *See* ECF No. 38 at  
20 8. The Court declines to span the gap between *Vargas* and the Mine Safety and  
21

1 Health Act. Therefore, the Court does not find that partial summary judgment for  
2 Plaintiff is warranted on the issue of a statutory basis for Defendant's direct liability.

3 Vicarious Liability

4 *Vargas* also set forth two theories of vicarious liability and found that the  
5 defendant general contractor in that matter owed a duty to plaintiff on those bases, in  
6 addition to the direct liability theories. First, the *Vargas* decision concluded that "a  
7 general contractor is vicariously liable for the negligence of any entity over which it  
8 exercises control." 194 Wn.2d at 741. According to the plain language of the  
9 contract quoted above, Defendant had a general supervisory function with respect to  
10 the transportation of ore by its own employees or those of a subcontractor.  
11 Therefore, Defendant retained sufficient control to face vicarious liability, if Plaintiff  
12 proves breach, causation, and damages at the time of trial. *See Vargas*, 194 Wn.2d  
13 at 740–41.

14 Lastly, *Vargas* held that "a general contractor that delegates its statutory duty  
15 to comply with WISHA is 'vicariously liable for the negligence of the entity subject  
16 to its delegation.'" 194 Wn.2d at 738 (quoting *Afoa v. Port of Seattle*, 191 Wash. 2d  
17 110, 124 (2018)).

18 Plaintiff does not refer the Court to any concrete support in the record for the  
19 delegation of a duty to comply with the relevant statutory or regulatory duties. In  
20 addition, as the Court discussed above, there is not firm support in *Vargas* or other  
21 authority offered by Plaintiff, to extend the holdings of *Vargas* that were particular

1 to Washington statutes and regulations to safety regulations promulgated under the  
2 federal Mine Safety and Health Act. Therefore, the Court denies Plaintiff's partial  
3 summary judgment motion with respect to delegation-based liability.

4 Accordingly, **IT IS HEREBY ORDERED:**

- 5 1. Plaintiff's Motion for Partial Summary Judgment, **ECF No. 38**, is  
6 **GRANTED IN PART** and **DENIED IN PART** as set forth above.
- 7 2. Defendant ACI shall be liable for non-party Giddings' negligence, if  
8 proven to a factfinder, as a matter of law based on a common law  
9 theory of direct liability and a control theory of vicarious liability.
- 10 3. Because this Order resolves only one element of Plaintiff's wrongful  
11 death claim, no judgment shall be entered at this time.

12 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this  
13 Order and provide copies to counsel.

14 **DATED** August 11, 2020.

15 *s/ Rosanna Malouf Peterson*  
16 ROSANNA MALOUF PETERSON  
17 United States District Judge  
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21